It is now well recognised, on principle and authority, that the courts must itemise the award of damages in personal injury cases under three separate heads, namely, special damages, compensation for pain, suffering and loss of amenities and lastly, loss of future earnings. In *Jefford* v. *Gee*[3] Lord Denning M.R. said at page 1212 that "the court will, in future, have to itemise the damages in most personal injury cases." This is because different rules of interest apply under the separate heads. An award of interest must be made having regard to the temporal conditions applicable to them. Thus under the head of special damages the discretion to award interest is calculated from the date of the accident; an award under pain, suffering and loss of amenities carries interest from the date of service of the writ to the date of trial; an award for future earnings carries no interest at all. The reason for awarding interest is to compensate the plaintiff from being kept out of money which theoretically is due to him at the date of the accident. Therefore, to allow interest on the award of damages for future earnings is wrong on the ground that the plaintiff *ex hypothesi* has not been kept out of his money.

In *Pickett* v. *British Rail Engineering Ltd.*[5] Lord Scarman at page 537 said that the decision of the Court of Appeal in *Cookson* v. *Knowles*,[4] in so far as it purported to deny interest to general damages, was *obiter*.

In the circumstances, the learned judge erred when he failed to itemise the award of damages into separate heads, so that it made it very difficult for him properly to exercise his discretion in relation to the award of interest.

Appeal allowed.

Solicitors: *Thillaimuthu & Phock Kin; R. Rajasingam & Co.*

CHUA HAN MOW v. SUPERINTENDENT OF PUDU PRISON

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Hashim Yeop A. Sani J.) November 2, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 37 of 1978]

Administrative Law — Habeas Corpus — Applicant detained on extradition warrants — Validity of committal — Legality of committal warrants — Mistake in form of warrant — Curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 366 & 422 — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 & 14.

International Law — Extradition — Validity of committal — Legality of committal warrants — Function of court — Principle of Speciality — Undertaking by foreign government — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 & 14.

Criminal Law and Procedure — Habeas Corpus — Procedure to be followed by court in committal proceedings — Prima facie case — Mistake in form of committal warrant — Curable — Criminal Procedure Code (F.M.S. Cap. 6), s. 422.

This was an appeal against the decision of Syed Othman F.J. ([1979] 2 M.L.J. 70). The learned judge refused an application for writs of *habeas corpus* to secure the release of the appellant from the prison where he had been detained under section 10(1) of the Extradition Ordinance, 1958. The appellant appealed on a number of grounds, *viz.* (1) non-compliance with the statutory Form D invalidated the detention; (2) the proper test in committal proceedings was not adhered to; and (3) the learned judge erred in holding that it was not the function of the court to examine whether there was a valid treaty or any other arrangement between Malaysia and the United States and in not holding that there had been non-compliance with the provisions of section 5(2) of the Extradition Ordinance, 1958.

Held: (1) where there is jurisdiction to commit the applicant, formal or technical defects in the warrant of commitment are not a good ground for the granting of a writ of *habeas corpus*. The fresh committal warrants which were in proper form issued by the same committal courts following the committal orders before the hearing of the appeal were a good and sufficient answer to the application for writs of *habeas corpus;*

(2) an extradition proceeding is in the nature of a committal proceeding and a committal proceeding is not a trial. As such the sole function of the committing magistrate is to adjudicate upon the question whether there is a *prima facie* case against the accused, that is to say, whether there is such evidence that, if uncontradicted at the trial, a reasonable jury properly directed could convict upon it. Where there is a doubt as to the weight or quality of the evidence the committing magistrate should refrain from assessing it but instead commit the accused and leave the duty of resolving the doubt to the trial court;

(3) in this case the proper test had been applied. There was a *prima facie* case for extradition and any question with regard to the weight or quality of the testimony was more properly the function of the court having jurisdiction to try the case;

(4) it was not necessary in this case to make a finding whether there was a valid extradition treaty or arrangement between the United States and Malaya. The Treaty of 1931 although it has not been gazetted under section 3(1) of the Extradition Ordinance, 1958, read with the exchange of letters, constituted an undertaking in compliance with the requirement of section 5(2) of the Ordinance.

Cases referred to:-

(1) *Schtraks* v. *Government of Israel* [1962] 3 All E.R. 533.
(2) *In re O'Dowd* (1903) 23 N.Z.L.R. 31.
(3) *In re Prisk* (1903) 22 N.Z.L.R. 876.
(4) *Reg.* v. *Richards* 5 Q.B. 926; 13 L.J.M.C .147.
(5) *Ex parte Cross* 26 L.J.M.C. 201.
(6) *Ex parte Smith* 27 L.J.M.C. 186; 3 H & N. 227.
(7) *Ex parte Dauncey* 8 Jur. 829; 13 L.J. Ex 165.
(8) *R.* v. *Home Secretary, Ex parte Iqbal* [1979] 1 W.L.R. 425; [1979] 1 Q.B. 264.
(9) *R.* v. *Lewes Prison (Governor), Ex parte Doyle* [1917] 2 K.B. 254, 266, 269, 270.
(10) *Re Low Kuan Meng* [1962] M.L.J. 265.
(11) *Re Osman* [1954] M.L.J. 237.
(12) *Public Prosecutor* v. *Ng Goh Weng* [1979] 1 M.L.J. 127.

The following cases were also referred to in argument: *Talib Hussain* v. *State* A.I.R. 1971 S.C. 62, 64; *Che Su binte Shafie* v. *Supt. of Prisons* [1974] 2 M.L.J. 194; *Kossekechatko* v. *A.G. for Trinidad* [1932] A.C. 78, 96; *Re Tan Boon Liat & Ors.* [1977] 2 M.L.J. 108; *Ram Pargas* v. *Emperor* A.I.R. 1948 All 129; *Re Carbon Waterfield* [1960] 2 All E.R. 178; 183; *In re Golam Hussain* (1896) 4 S.S.L.R. 64, 66; *In re Arton (No. 2)* [1896] 1 Q.B. 509, 518; *The King* v. *Dix* (1901-2) 18 T.L.R. 231.

FEDERAL COURT.

Karpal Singh (*Sidney Augustine* with him) for the appellant.

Zakaria Yatim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): On June 1, 1978, Syed Othman F.J. refused an application by counsel for the appellant for writs of *habeas corpus* directed

to the Superintendent of Pudu Prison, Kuala Lumpur to secure the release of the appellant from the said prison where he has been detained under section 10(1) of the Extradition Ordinance, 1958. The applicant was committed pursuant to the orders of the learned Presidents, Sessions Court, Kuala Lumpur who heard the applications by the United States Government for his extradition to that country to be tried on six counts of offences relating to narcotic drugs alleged to have been committed by him in New York under the United States Code (Criminal Application No. 16/78) and on three other counts of similar offences alleged to have been committed by him in California (Criminal Application No. 17/78). It is not disputed that the alleged offences are extradition crimes within the meaning of the said Ordinance.

The application to the learned judge was accompanied by various affidavits made by the appellant from which the following facts appear. He is a Malaysian Citizen. On December 21, 1977 he was arrested at the General Hospital, Penang. On April 4, 1978 the President, Sessions Court, Kuala Lumpur committed him to Pudu Prison under section 10(1) of the said Ordinance in respect of Criminal Application No. 16/78. On May 12, 1978 another President, Sessions Court, Kuala Lumpur made a second committal order under the same section in respect of Criminal Application No. 17/78. It is conceded that both the orders were in fact erroneous since they were made in accordance with the provisions of Criminal Procedure Code and not, which should have been the case, in accordance with Form D of the Second Schedule of the said Ordinance.

The appellant appealed on a number of grounds which in our view can be grouped under three main heads. Firstly, non-compliance with statutory Form D invalidated the detention; secondly, the proper test as laid down in *Schtraks* v. *Government of Israel*[1] was not adhered to and finally, the learned judge erred in law in holding that it was not the function of the court to examine whether there was a valid treaty or any other arrangement between Malaysia and the United States, and in not holding that there had been non-compliance with the provisions of section 5(2) of the said Ordinance.

Non-compliance with statutory Form D:

In a nutshell the learned judge held that although the first committal orders were erroneous they could be cured by the simple expedient of directing the committal courts to issue fresh committal warrants in proper form. He accordingly directed them to do so. On February 26, 1979, that is some six months before the hearing of the present appeal, fresh committal warrants were issued to the Superintendent of Pudu Prison by the committal courts. It is now said on the authority of a statement of Lord Reid in *Schtraks'* case, *supra* that the learned judge had no power to issue fresh committal warrants. Briefly what Lord Reid said was that the court is not entitled to receive further evidence in a *habeas corpus* proceeding. The short answer to counsel's contention is that a fresh committal warrant is not fresh evidence.

It is established law that a warrant of commitment erroneous in form, even where such error makes it invalid as an authority in law for the detention of a prisoner, can be cured by the issue of a subsequently validly drawn warrant by the competent authority, and that such warrant justifies the continuance in prison of a person who, before the issue of such warrant, may have been held in custody without lawful authority. In *Re O'Dowd*[2] the magistrate pronounced judgment, sentencing the applicant to three months' imprisonment, but the warrant was wrongly drawn up with the words "three months' imprisonment with hard labour" inserted. That the magistrate had no power to do. A rule *nisi* for a writ of *habeas corpus* having been granted and before the case came up for argument, a new warrant was lodged with the gaoler omitting the words "with hard labour". It was held that the new warrant was a complete answer to the motion for a rule absolute. In that case the court was only concerned with jurisdiction; as long as there was jurisdiction to make the order or give the judgment that was pronounced a fresh warrant of commitment following the said order or judgment may be substituted for a warrant of commitment that was erroneous in form. The fresh warrant must not therefore be an alteration of the said order or judgment or in respect of an offence other than which was considered when the said order or judgment was imposed. It must express the intention of the court on sentencing the prisoner. That power exists to issue a new warrant to express the true intention of the court, even after proceedings for *habeas corpus* have been commenced and a rule *nisi* issued was also decided in *Re Prisk*.[3] A very useful review of the English cases is to be found in the judgment and I would with respect reproduce them here (pages 885-6):

> "In *Reg.* v. *Richards*[4] a new warrant was issued a week after the prisoner was lodged in gaol. Lord Denman said, 'It is impossible not to see that the Gaoler has returned good warrants, upon which the parties may be lawfully detained.' A like decision was given in *Ex parte Cross*,[5] where a new warrant had been lodged, as here, before a rule for a writ was obtained. The court, said the second warrant is an answer to the rule. In *Ex parte Smith*[6] the same was held, and in *Ex parte Dauncey*[7] the new warrant was issued after the rule *nisi* was granted, as in this case."

A close analogy is also afforded by the case of *R.* v. *Home Secretary, ex parte Iqbal.*[8] There an immigration officer detained the applicant as an illegal immigrant. The detention order was printed in the alternative and set out alternative grounds of detention under paragraphs 16(1) and 16(2) of section 2 of the Immigration Act, 1971. By mistake the wrong ground of detention was given. The applicant brought *habeas corpus*. On the day of the hearing before the Court of Appeal a fresh detention order was made which was valid. It was held that a writ of *habeas corpus* could not issue when there was a valid order detaining the applicant.

In the face of that formidable array of authority we are satisfied that the fresh committal warrants which were in proper form, issued by the same committal courts following the committal orders before the hearing of the present appeal are a good and sufficient answer to the application for writs of *habeas corpus*. Where as here there is jurisdiction to commit the applicant, formal or technical defects in the warrants of commitment are not a good ground for the granting of the writs: see *R.* v. *Lewes Prison (Governor), Ex parte Doyle.*[9]

The proper test in Schtraks' case:

It was further contended that the depositions taken in the United States were that of accomplices and agent provocateurs and applying the test as laid down by Lord Reid in *Schtraks'* case, *supra,* no reasonable jury properly directed could convict the applicant on such evidence. Lord Reid said this (page 533): "It is not in dispute that the proper test for the magistrate to apply was whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty." In our view that observation was directed to the trial proper that is whether at the hearing before the jury there was sufficient evidence to convict. An extradition proceeding is in the nature of a committal proceeding (see section 9(2) of the Extradition Ordinance); and a committal proceeding is not a trial: see *Re Low Kuan Meng*[10] and as such the sole function of the committing magistrate is to adjudicate upon the question whether a *prima facie* case against the accused, that is to say, whether there is such evidence that, if uncontradicted at the trial, a reasonable jury properly directed could convict upon it. Where there is a doubt as to the weight or quality of the evidence the committing magistrate should refrain from assessing it but instead commit the accused and leave the duty of resolving the doubt to the trial court. See *Re Osman;*[11] *Public Prosecutor* v. *Ng Goh Weng.*[12]

In our view the proper test has been applied. There is a *prima facie* case for extradition and any question with regard to the weight or quality of the testimony is more properly the function of the court having jurisdiction to try the case.

Whether there was a valid treaty or arrangement between Malaysia and the United States and non-compliance with section 5(2) of the Extradition Ordinance:

Let us first look at the relevant provisions of the Ordinance itself. Section 3(1) of the Ordinance, *inter alia,* provides that where an arrangement has been made between this country and any foreign country for the mutual surrender of fugitive criminals, the Yang di-Pertuan Agung may by Order to be published in the *Gazette declare* that the provisions of the Ordinance *shall apply* to such foreign country. No such order has been made in respect of the United States. The new section 3A provides that where a foreign country (meaning a non-Commonwealth country or a Commonwealth country which is not a prescribed Commonwealth country within the meaning given in the Commonwealth Fugitive Criminals Act, 1967) in respect of which no order has been made under section 3(1) referred to earlier, or the order if made is not in force and such foreign country makes a request for the extradition of a fugitive criminal, the Minister responsible may personally if he deems it fit to do so give a special direction in writing that the provisions of the Ordinance be applied in relation to the extradition of that particular fugitive criminal *as if* there is in force in respect of that foreign country an order under section 3(1). A special direction by the Minister of Law was made under section 3A of the Ordinance in respect of the appellant on March 21, 1978 (page 108).

The object of the new section 3A of the Ordinance is obviously to provide for the *ad hoc* extradition of a fugitive criminal at the request of a foreign country in respect of which there is no subsisting extradition treaty or any other arrangement with this country so that the provisions of the Extradition Ordinance shall nevertheless be applied to the extradition to ensure compliance with certain established principles in international law relating to the extradition of fugitive criminals. One such principle which the appellant contends had not been complied with is the *principle of specialty* usually embodied in extradition treaties. This in our domestic law is a requirement to be complied with under section 5(2) of the Ordinance before a fugitive criminal can be surrendered to a foreign country. The section provides that a fugitive criminal shall not be surrendered to a foreign country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity or returning to the Federation, be detained or tried in that foreign country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

According to the deposition of the Principal Assistant Secretary of the Malaysian Foreign Affairs (page 65) there is extradition treaty between Malaysia and the United States. What the foreign affairs officer meant of course was that after she gained Independence in 1957 the Federation of Malaya (later became Malaysia) has not entered into any formal extradition treaty with the United States. In fact on record there is so far only one foreign country which has been the subject of an order made under section 3(1) of the Ordinance and that foreign country is Thailand — see the Extradition (Thailand) Order 1960 — L.N. 305/60. However, although there has been no order made under section 3(1) in respect of the United States there is in fact an arrangement by way of succession in the form of the extradition treaty between the United States and Great Britain entered into on December 22, 1931 (sometimes referred to as the "Dawes-Simon Treaty") which although it has not been gazetted nevertheless exists and mutually recognised as between Malaysia and the United States by virtue of an exchange of letters between the two sovereign governments. On October 15, 1958 the American Embassy at Kuala Lumpur addressed an aide-memoire to the Malaysian Ministry of External Affairs stating, *inter alia,* that the U.S. Department of State was of the view that the extradition treaty of 1931 between the United States and Great Britain extended to all states and former colonies then constituting the Federation of Malaya. The aide-memoire further stated the view of the Department of State that the assumption of the government of the Federation of Malaya by the agreement of September 12, 1957 between the Federation and the United Kingdom of all obligations and responsibilities of the Government of the United Kingdom arising from any valid international instrument extended the 1931 Treaty into force between the United States of America and the Federation of Malaya. To this aide-memoire the Malaysian Ministry of External Affairs replied that the Federation Government accepted the responsibilities and obligations of the Extradition Treaty of 1931 referred to and regarded the treaty as binding

between the United States and the Federation of Malaya. It was also noted that the aide-memoire of October 15, 1958 and the Note of the Malaysian Ministry of External Affairs were to be regarded as constituting the agreement in this matter (pages 166-167).

Article 7 of the Dawes-Simon Treaty expressly provides for the principle of specialty as follows: —

"A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has surrendered."

We therefore agree that it would not be necessary to make a finding whether there is a valid extradition treaty or arrangement between the United States and Malaysia. But for the purpose of satisfying the requirement of section 5(2) of the Ordinance, it will be sufficient if there can be found somewhere an undertaking on the part of that foreign country (in this case the United States) that the principle of specialty is guaranteed. The fact that no order has been made under section 3(1) in respect of the United States does not preclude us from examining the Dawes-Simon Treaty of 1931 and the undertaking expressed in the subsequent exchange of letters between the two governments. We have found it as a fact that the 1931 treaty although it has not been gazetted, read with the exchange of letters constitutes an undertaking in compliance with the requirement of section 5(2) of the Ordinance.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

TAN KUI LIM & ANOR. v. LAI SIN FAH

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 4 & November 3, 1979]

[Kuching — Federal Court Civil Appeal No. 92 of 1979]

Family Law — Adoption — Adoption of grandson by Chinese Lady in Sarawak — Whether adoption must be in accordance with Chinese customary law — Adoption contrary to Chinese custom — Illegality — Adoption Ordinance (Sarawak Cap. 91), ss. 2, 5, 6(2), 6(3), 7 & 8.

Chinese Customary Law — Adoption of grandson by grandmothers — Illegal.

In this case the respondent, the son of Madam Chang Shok Moi (deceased), applied for an order declaring the adoption of her grandson by the said Madam Chang Shok Moi to be null and void. The learned trial judge held that the adoption was contrary to Chinese custom and was therefore illegal. The respondents, the natural parents of the adopted grandson, appealed.

Held: (1) the adoption of a boy by a Chinese in Sarawak could only be valid if it is in accordance with Chinese customary law and the proviso to section 6(3) of the Adoption Ordinance recognises by necessary implication, if not expressly, that law;

(2) under Chinese customary law the adoption of the grandson by the grandmother in this case was void and the court could not therefore enforce the transaction, which was vitiated with illegality.

Cases referred to:-

(1) *Tay Pok Ann* v. *Tay Sok Kiong & Anor.* [1955] S.C.R. 17.

(2) *Chan Bee Neo & Ors.* v. *Ee Siok Choo* [1947] S.C.R. 1.

(3) *Phiong Khon* v. *Chonh Chai Fah* [1970] 2 M.L.J. 114.

FEDERAL COURT.

Anthony Liew for the appellants.

John Lee for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with the validity of an adoption by a lady, since deceased, of her grandson as her son. The estate involved is said to be now worth a million dollars.

The deceased, one Madam Chang Shok Moi, widow of Lai Chee, had one son, Lai Sin Fah and five daughters. The grandson in question, Tan Ten Chew, is the son of Lai Joon Nyiat, one of the daughters and the only one amongst them involved in the dispute. Section 17 of the Administration of Estates Ordinance (Cap. 80 Laws of Sarawak, 1947 Edition) applies the customary Chinese law on inheritance, since neither the English law nor the Distribution Enactment 1958 of West Malaysia has been extended to Sarawak. If the law correctly is that daughters are not entitled to a distributive share but only to maintenance before marriage, see *Tay Pok Ann* v. *Tay Sok Kiong & Anor.*[1] at page 20, it means that the petitioner Lai Sin Fah inherits the whole of the residuary estate of the deceased as the only son, subject to a duty to maintain his unmarried sisters. But if the *de jure* adoption of the grandson is valid and legal, the petitioner would have to share the estate equally with his erstwhile nephew. The stakes therefore in this application, instituted curiously by petition and not by originating summons under Order 54A rule 1A Rules of the Supreme Court, 1957 for an order declaring the adoption null and void are half a million dollars. The petitioner cited the natural parents of the boy as the respondents. They were the ones who had given away their son in adoption.

The adoption was under the Adoption Ordinance (Cap. 91, Sarawak Laws), and it is now necessary to consider the several sections of the Ordinance relevant to this case.

Section 2 which reads

"2. — (1) Subject to the provisions of this Ordinance any person may adopt a child.

(2) Such adopted child shall stand in the same relation to the adopting parent or parents as would a child born in wedlock and shall have all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents.

(3) The natural parents of such adopted child shall have no control or right over such adopted child and such adopted child shall have no claim by inheritance to the property of his natural parents.

(4) The provisions of subsections (2) and (3) shall cease to have effect if the adoption is annulled under the provisions of section 7."

enables any person to adopt a child and sets out the effect of the adoption in relation to the inheritance of the estates of the adoptive and the natural parents.

The procedure on adoption is outlined in section